S.B. Regular First Appeal No. 111/1985
M/s Pareek Brothers Vs. Union of India

Date of Order: May 10th, 2006

HON'BLE MR. K.C.SHARMA, J.

Mr. R.K. Mathur } for the appellant
Miss Shilpi Gupta }
None for the respondent.

This civil first appeal under S. 96 CPC arises out of the judgment and decree dated 6th July, 1985 passed by the learned Additional District Judge No.2, Bharatpur thereby dismissing the plaintiffs' suit for recovery of Rs. 11,000/-, with costs.

The plaintiffs' case as set out in the plaint was that on 1.10.1980 the defendant Western Railways failed to deliver black coal booked by M/s Kurendi Coalary, Asansol on 29.9.1980 vide Invoice No.24 and Railway Receipt No. 962416, to the plaintiff who was consignee, at Railway Station Bharatpur. The plaintiff then gave notice under Sec. 78B of the Indian Railways Act (hereinafter to be referred to as “the Act”) on 23.5.1981to the defendant, which the defendant received on 31.5.1981. Having received notice, the defendant vide Ex.5 accepted the claim of the plaintiff and partly sanctioned a sum of Rs. 3336/-. Ultimately, the plaintiff disagreeing with the defendant, served a

notice under Section 80 CPC and thereafter filed the present suit for recovery of a sum of Rs. 11,000/-.

The defendant contested the suit by filing written statement and denied the allegations.

On the basis of pleadings of the parties, the learned trial court framed as many as 9 issues and at the conclusion of trial and on hearing the parties, the learned trial court dismissed the plaintiffs' suit vide its judgment and decree dated 6.7.1985. Hence this appeal by the plaintiff.

I have heard learned counsel for the appellant and gone through the impugned judgment and the evidence on record.

Out of 9 issues, including issue No.9 concerning relief, the trial court decided following issues against the plaintiff:

> Whether the plaintiff gave notice under S. 80 CPC? (Issue No.2)
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> Whether the suit was not maintainable in the light of averments made in para 12 of the written statement? (Issue No.6)
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> Whether the notice under Sec. 78-B of the Act was beyond the statutory period and that being so the suit was not maintainable? (Issue No.7)

So far as Issue No. 2 is concerned, in deciding this issue, the learned trial court has come to a finding that the person who issued the notice (Ex.6) under Sec. 80 CPC and the person who instituted the suit are not the same persons and there is no mention in Ex.6 that Jugal Kishore is the Proprietor of the plaintiff firm. Relying upon the law propounded by this court in Ramji Lal Vs. Union of India (AIR 1974 (Raj) 18), the learned trial court concluded that since it has not been mentioned in Ex.6 that Jugal Kishore is the Proprietor of the plaintiff's firm, therefore, it cannot be taken to be the compliance of Sec. 80 CPC.

It appears that the notice, Ex.6 was issued on behalf of M/s Pareek Brothers, Gulab Kunj, Alwar and the suit has been instituted by M/s Pareek Brothers through sole Proprietor Jugal Kishore. In this view of the matter it cannot be said that the person who issued notice and the person who instituted the suit are the different persons. In Ramji Lal's case (supra), the notice under S. 80 CPC was issued on behalf of M/s Ramjilal Girraj Prasad and the suit was filed by Ramjilal and in para 1 of the plant it was mentioned that plaintiff is the Manager of Joint Hindu Family and

carries on business under the name and Styleof `Ramjilal Girraj Prasad'. However, it was not mentioned in the notice that Ramjilal was the Proprietor of the business. It was in these circumstances that this court held that the person sending the notice is the same as the person suing. Hence, Ramjilal's case relied upon by the trial court is not applicable to the present case as the facts of that case are distinguished with the facts of the present case. For the reasons therefore, the finding on issue No.2 cannot be sustained and is liable to be reversed and this issue stands decided in favour of the plaintiff.

Issue No.6 as regards maintainability of the suit, the trial court while deciding this issue against the plaintiff has concluded that plaintiff is neither the consignor nor consignee and te suit instituted by him is not maintainable. In deciding this issue against the plaintiff, the trial court has relied upon a decision of the Apex Court reported in AIR 1966 SC 395.

While deciding issue No.1, the learned court has come to a finding that M/s Kurendi Coalary, Asansole dispatched the coal weighing 28.6 metric tone through invoice No.26 and Railway Receipt No. 962416 (Ex.1) on

29.9.1980 from Asansole to be delivered to the plaintiff at Bharatpur. Thus, the finding on issue No.6 per se is contradictory to the finding on issue No.1. A glance at Ex.1 clearly shows that consignor was Kurendi Coalary Asansole and consignee was Rajasthan Small Scale Industries. The consignee endorsed the railway receipt in favour of plaintiff for delivery of coal at Bharatpur and therefore, title to the goods stood passed from consignee to the plaintiff and as such the present suit filed by the plaintiff is maintainable. It would not be out of place to mention that even the Railway vide Ex.5 issued pay order for Rs. 3336/- in favour of the plaintiff while deciding the claim. For the reasons therefore, the finding on this issue is reversed and stands decided in favour of the plaintiff.

Now comes Issue No.7 i.e. whether the notice under Section 78-B of the Act was issued after expiry of the statutory period. The Railway Receipt is dated 29.9.1980. Through letter dated 2nd March, 1981 the plaintiff has lodged a complaint to the Chief Commercial Superintendent, Western Railway, Church Gate, Bombay, either to deliver the coal or to arrange payment. In reply to the letter dated 2.3.1981, the

Chief Commercial Superintendent letter dated 23.4.1981 (Ex.9) has informed the plaintiff that the letter dated 2.3.81 is receiving attention.

No doubt, in para No.4 of the plaint it is averred that the plaintiff lodged the claim on 23.5.1981 which came to be received by the defendant on 31.5.1981. However, the fact remains that the defendant considering and treating the plaintiff's letter dated 2.3.1981 as a claim, accepted the claim of Rs. 3336/- vide letter dated 15.1.1982, Ex.5. To decide the controversy it would be profitable to refer the provisions of Sec. 78-B of the Act as existed prior to amendment in the Act:

> "78B. **Notification of claims to refunds of overcharges and to compensation for losses.** A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction, damage, deterioration or non-delivery of animals or goods delivered to be carried unless his claim to the refund or compesation has been preferred in writing by him or on his behalf-
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> to the railway administration to which the animals or goods were delivered to be carried by railway, or
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> to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurred,

> within six months from thje date of the delivery of the animals or goods for carriage by railway;
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> Provided that any information demanded or inquiry made in writing from, or any complaint made in writing to, any of the railway administration mentioned above by or on behalf of the person within that said period of six months regarding the non-delivery or delay in delivery of the animals or goods with particulars sufficient to identify the consignment if such animals or goods shall, for the purposes of this section, be deemed to be a claim to the refund or compensation".

Thus, considering the provisions of Section 78-B of the Act as quoted above, it must be concluded that the letter dated 2nd March, 1981 (Ex.4) was the claim and that claim was lodged by the plaintiff within the statutory period. Hence the finding of the trial court on issue No.3 being perverse is reversed and this issue stands decided in favour of the plaintiff.

Now remains the only question whether the finding of the trial court on issue No.3 regarding sufferance of loss of Rs. 29,982 by the plaintiff on account of negligence of employees of the defendants is liable to be sustained or not? In deciding the issue, the trial court has arrived at a finding that the plaintiff could not get the delivery of coal due to negligence on the

part of employees of the defendant. A perusal of the judgment makes it clear that the trial court has not recorded any finding in regard to the amount of damages, whereas Issue No. 3 was to the effect whether the plaintiff suffered loss of Rs. 29,982 on account of negligence on the part of employees of the defendant.

To find out the quantum of damages, it is the market price of the goods of which loss was suffered, at the time of damage. The plaintiff could not prove the market price of the coal as existed at the time of damages, by adducing evidence. However, it is evident that as per the bill, Ex.2 the cost of coal at the relevant time was Rs. 142 per metric tone which included sales tax to the tune of 8% and therefore the cost of the coal weighing 28.6 metric tone comes to Rs. 4386.90, to which the plaintiff must be held to be entitled to receive from the defendant on account of non-delivery of coal.

So far as award of interest is concerned, suffice it to observe that in the absence of any usage or contract express or implied or of any provision of law to justify the award of interest by way of damages, the interest cannot be awarded, specially when the

defendant accepted the claim of the plaintiff and also tendered amount of Rs. 3336/-.

Resultantly, this appeal is allowed in part. The plaintiff is held entitled to receive Rs. 4386.90 from the defendant with interest at the rate of 6% p.a. with effect from the date of filing of the suit till realization of the amount.

The judgment and decree of the trial court stands modified to the extent indicated above, with no order as to costs.

(Khem Chand Sharma), J.

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